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IN THE

Supreme Court of The United States

NO. 1690

NEVA M. SHANKLIN, etc.,

Petitioner,

v.

AMERICAN NATIONAL TRUST and REPUBLIC NATIONAL TRUST,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The opinion of the United States Courts of Appeal for the Seventh Circuit is now reported in 420 F.2d 1117.

QUESTIONS PRESENTED

Respondents do not agree with the petitioner's statement of the questions presented. Section 149 of Chapter X of the Acts of Congress relating to Bankruptcy (11 USC 549) provides:

> "An order, which has become final, approving a petition filed under this chapter shall be a conclusive determination of the jurisdiction of the court."

The sole question presented is whether this section precludes an attack on the District Court's jurisdiction under Chapter X proceedings when petitioner:

1. Appeared by counsel at the hearing in the District Court on the question of whether the petition should be approved, and in response to a question of the court, advised that she had no objection to the approval of the petition; and

2. Did not file an answer contravening the petition, pursuant to and within the time allowed by section 137 of Chapter X (11 USC 537)

Petitioner's only attack below was on the jurisdiction of the District Court, and petitioner raised no questions or issues relating to the necessity or the desirability of continuing the Chapter X proceedings.

STATEMENT OF THE CASE

Petitioner flagrantly misrepresented the proceedings in the District Court. She was afforded two opportunities to object to the approval of the petitions in reorganization. At the first, her counsel stated that there was no objection. Although she had notice of the second hearing, she did not appear or file any pleadings objecting to the proceedings.

On February 13, (R. p. 29) and February 26, 1968 (R. p. 38), petitions for reorganization under Chapter X of the Acts of Congress relating to bankruptcy were filed in the District Court for the Southern District of Indiana against American National Trust and Republic National Trust respectively. The alleged debtors were real estate trusts with their principal offices in Indianapolis, Indiana. The two trusts had common trustees and shared the

same offices (R. p. 67). Pending a hearing on these petitions, a receiver was appointed (R. p. 49).

The debtors each filed answers and opposed the approval of the petitions (R. pp. 47, 55). Thereafter, on April 4, 1968, the appellant, Neva Shanklin, filed her motion to intervene and, at the same time, tendered her "Motion to Dismiss Petition and to Vacate and Set Aside Order Appointing Receiver and Order Adjudicating American National Trust and Republic National Trust, Bankrupts" (R. pp. 57, 59). The hearing on the approval of each petition and the motion of the appellant, Neva Shanklin, was set for hearing on April 26, 1968.

On the morning of the hearing, the alleged debtors asked for leave to file amended answers, consenting to the granting of the petitions under Chapter X and such leave was granted by the Court (R. p. 61). The Amended Answers consented to the granting of the petition in reorganization (Resp. App. p. A-1). The petitioning creditors introduced evidence to the effect that in the sale of the certificates of beneficial interest, representations were made that the certificates would be redeemed by the trust at any time (Tr. of Evidence, pp. 18-19). Following the presentation of petitioning creditors' evidence, the following exchange took place between counsel for Neva Shanklin, (Mr. Dowling), counsel for the debtors, (Mr. Lobley), and the Court:

> "THE COURT: I would inquire at this time: Are there any persons present who have objection to make to the petition for reorganization under Chapter 10?
>
> MR. DOWLING: Your Honor, I don't have any objection, I just have a question which probably should be put to counsel for the Trusts. Looking at their answer and in particular the denial that the petitioners are creditors, does the answer and their position

mean, and their consent to the reorganization petition, does that mean they consent and join in and request the reorganization as if the Trusts had originally filed the petition for reorganization? If they say, 'Yes, it is the same thing,' then my position is moot.

MR. LOBLEY: Our position is that we consent to the reorganization and feel that it should be taken and proceeded with in accordance with the petition. We do not at this time though, however, on the information available to us, admit that the certificate holders are creditors as such. For that reason, we deny that particular paragraph. However, we do consent to the proceedings in spite of the fact—and, I suppose, while we are not actually voluntarily initiating the proceedings, the net effect is the same by virtue of the consent.

MR. DOWLING: Thank you.

THE COURT: The Court then, Mr. Dowling, would consider your motion to intervene as a motion to appear, and your motion to appear in this proceeding is granted on behalf of the shareholder Neva Shanklin.

MR. DOWLING: Right."
(Tr. of Evidence, pp. 37-38).

The Court then ordered the petitions approved and a trustee appointed (R. p. 68). The order approving the petitions and appointing the trustees set June 28, 1968 at 9:30 a.m., as the time for the hearing pursuant to § 161 of Chapter X (11 U.S.C. § 569), (Resp. App. p. A-2). All creditors and certificate holders were notified of such hearing and each could have, pursuant to § 137 (11 U.S.C. § 537), filed an answer contravening each of the petitions. No contravening answers were filed nor were any objections made to the retention of the trustees.

On December 23, 1968, appellant, Neva Shanklin, filed her "Petition to Vacate and Set Aside Order Approving

Petitions Entered April 26, 1968; to Dismiss Proceedings; and Other Equitable Relief." This petition questioned the right of certificate holders of a real estate trust to petition for a reorganization and questioned the trustees of each of the trusts' good faith in consenting to the granting of the petition (R. p. 86). On December 27, 1968, the trustee filed his Motion to Strike the petition filed by Neva Shanklin (R. p. 101) and on December 30, 1968, the Court sustained the motion on the grounds that Neva Shanklin had had the opportunity to raise these questions at the hearing on the granting of the petitions on April 26, 1968 or at the hearing on June 28, 1968 and did not do so. The court found that in light of her failure to do so, she could no longer attack the jurisdiction of the District Court over the proceedings (R. p. 107, Pet. App. p. A11)

ARGUMENT

The Question Sought to be Presented is not One of Significance

Petitioner attacks the jurisdiction of the United States District Court for the Southern District of Indiana under the Chapter X reorganization proceedings of two real estate trusts which maintain their offices in the Southern District of Indiana. Her attack on the jurisdiction of the District Court is based solely upon the capacity of the persons filing the petition, as creditors, to file such petition. The petitioner does not question the fact that the debtors had their principle place of business in the Southern District of Indiana nor does she contest the fact that the only Court which could have jurisdiction over Chapter X reorganization proceedings of the debtors was the United States District Court for the Southern District of Indiana. Petitioner does not raise any question of procedural due process with respect to notice to her or to the debtor corporations. Therefore, the United States District Court had jurisdiction of the general subject matter of the proceedings and all persons were properly notified of the initiation and pendance of the proceedings. Therefore, the propriety of the approval of the petition for reorganization was a question of fact to be determined by the District Court, which had jurisdiction over the person of the debtors and over the subject matter of the proceedings.

Petitioner did not, in the lower court, nor does she here, seek to raise any question as to whether, on the merits, the Chapter X proceedings should be continued. Since the United States District Court for the Southern District of Indiana had jurisdiction over the general sub-

ject matter and over the person of the debtors, the question petitioner seeks to present does not show any departure from the accepted and usual course of judicial proceedings.

Petitioner Failed to Properly Raise the Question She Seeks to Present

§ 149 of the Acts of Congress (11 U.S.C. § 549) relating to bankruptcy provides:

> "An order, which has become final, approving a petition filed under this chapter shall be a conclusive determination of the jurisdiction of the court."

Senate Report 1916 on H.B. 8046, 75th Cong., 3d Ses. (1938) provides at page 27 that this section

> "is designed to foreclose all direct and collateral attack upon jurisdiction or venue."

If applied to the debtors themselves, the filing of the amended answers consenting to the reorganization precluded each of the debtor trusts from further contesting the Court's jurisdiction. With respect to petitioner, Neva Shanklin, any creditor or shareholder has the right to file an answer contesting the petition for reorganization whether such petition be filed voluntarily by the debtor or filed by creditors. This right is set forth in § 137 (11 U.S.C. § 537) which reads:

> "Prior to the first date set for the hearing provided in Section 161 of this Act, an answer controverting the allegations of a petition by or against a debtor may be filed by any creditor or indenture trustee or, if the debtor is not insolvent, by any stockholder of the debtor."

and in § 144 (11 USC § 544) which reads:

> "If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied."

In this case the date set for hearing, pursuant to § 161 (11 USC § 569), was June 28, 1968. At that time, neither Neva Shanklin nor any creditor or other certificate holder filed a contravening answer pursuant to § 137 (11 USC § 537).

Thus, in this case the time for Neva Shanklin to contest the jurisdiction of the District Court passed when, at the latest, she did not file a contravening answer under § 137 (11 USC § 537) at or prior to the § 161 (11 USC § 569) hearing on June 28, 1968. She may well have been precluded from contesting the District Court's jurisdiction by virtue of her appearance at the hearing on the approval of the petitions on April 26, 1968 when, in response to a question by the Court, she advised that she had no objection to the approval of the petitions. But in any event, any attack on the District Court's jurisdiction by the appellant, Neva Shanklin, or any other person was concluded and the Court's jurisdiction conclusively established when no contravening answer under § 137 (11 U.S.C. § 537) was filed by June 28, 1968.

The District Court Properly Approved the Petition

The petitions for reorganization under Chapter X in each of these proceedings were filed by certificate holders of the debtor real estate investment trusts. Whether or not such certificate holders have the standing to file such petitions depends upon the facts and circumstances surrounding each case. If the facts show that the certificate holders are in the position of shareholders, they may not file such petitions unless they are also creditors. *Bryan v. Welsh*, 72 F.2d 618 (10th Cir., 1934).

On the other hand, if because of right of redemption and other surrounding facts and circumstances, the certificate holders have the characteristics of creditors, they may file the Chapter X petitions. *Selected Investments Corp. v. Duncan*, 260 F.2d 918 (10th Cir., 1958).

In the present case, the petitions against American National Trust and Republic National Trust were filed by three (3) certificate holders of each trust. While initially opposing the petitions, the alleged debtor trusts each, on the day of the hearing on the petitions, filed amended answers. These amended answers admitted all of the allegations of the petitions except that the petitioners were creditors. The amended answers each affirmatively consented to the granting of the petitions for reorganization because the trustees of each of the trusts believed that an effective reorganization of the trusts could not be made without Court assistance. Following the filing of such answers, evidence was introduced showing that representations had been made to some certificate holders at the time of the sale to them to the effect that the trusts would redeem the certificates for cash at any time. Following this hearing, the Court approved the petitions.

The amended answers of the debtor trusts had the effect of making the petitions voluntary petitions by each of the trusts. A similar matter was presented under Chapter X's predecessor, § 77(b) of the Bankruptcy Act, in *In re Palisades-on-the-Desplaines*, 89 F.2d 214 (7th Cir., 1937). In that case, creditors had filed a petition for reorganization. The debtor answered admitting jurisdiction, its inability to meet its debts, and assenting to the reorganization. The Court said at page 217:

> "The debtor's verified answer avers facts sufficient to authorize the approval of a voluntary petition, and the court was warranted in so treating it. Whether it considered it as such, or regarded the creditors' petition, aided by the answer, as sufficient, is immaterial. Both are permissible under the statute, as we construe it, and either would carry out its plain intention. It is urged, however, that the court did not specifically approve the answer. That part of the section which we have quoted does not require that the court specifically approve the answer, but that it did consider its allegations, and approve, and rely upon them is quite manifest from the recitals of the decree.
>
> (3) Certain authorities upon which appellant relies have been cited to the effect that jurisdiction can not be conferred by mere admission. As a general rule, that is true, but that rule applies to cases where jurisdiction is inherently lacking. Here, however, the District Court was the only one which could have jurisdiction of the subject matter, and only upon conditions which depended entirely upon allegations of fact. The only one lacking was furnished by the debtor's admission, which it had a right to make, and under such circumstances we think jurisdiction was thereby conferred."

This rule was applied to the status of the petitioning creditors in *In re Central Forging Co.*, 101 F.2d 736 (3d Cir., 1939) where the Court said at page 738:

> "Furthermore the debtor filed an answer admitting the allegations of the petition and joining in its prayers. This the debtor had a right to do even though a receiver was in possession of its property. In re C. Moench & Sons Co., 2 Cir., 130 F. 685; Struthers Furnace Co. v. Grant, 6 Cir., 30 F.2d 576. The effect of its answer was to convert the proceeding into a voluntary one and thus to remove from the case the question as to the petitioning creditors' status and as to the debtor's solvency."

This principle was again recognized in *In re Hudson & Manhattan Railroad Co.*, 229 F.2d 616 (2d Cir., 1956). Thus the answers of each of the alleged debtors consenting to the granting of the petitions removed from the creditors' petitions whatever infirmities may have existed, including any questions with regard to the status of the petitioning creditors. Moreover, the Court was justified, in light of the evidence in the record, to find that the petitioning certificate holders did in fact have standing as creditors.

CONCLUSION

The petitioner did not properly preserve in the lower court the jurisdiction question she now seeks to present to this court. Moreover, she raises at most the question of a technical defect in the petitions for reorganization and raises no question of the District Court's jurisdiction over the debtors or over the general subject matter of the proceedings. If she is dissatisfied with the proceedings on the merits she may still raise those questions, which she

has not yet done, in the District Court. Under these circumstances, petitioner has failed to show any departure from the accepted and usual course of judicial proceedings.

Respectfully submitted,

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Order Appointing Trustee A-1

APPENDIX

The Amended Answer of debtor American National Trust is as follows:

"Comes now the alleged debtor and for its amended answer to the Petition filed herein says:

1. It admits the material allegations of rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12.
2. It denies the material allegations of rhetorical paragraph 10.

Comes now the alleged debtor and based upon the foregoing answer to the Petition filed herein consents and acquiesces to the approval of the Petition for Reorganization and to the appointment of a Trustee herein."

The Amended Answer of debtor, Republic National Trust is as follows:

"Comes now the alleged debtor and for its amended answer to the Petition filed herein says:

1. It admits the material allegations of rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12.
2. It denies the material allegations of rhetorical paragraph 10.

Comes now the alleged debtor and based upon the foregoing answer to the Petition filed herein consents and acquiesces to the approval of the Petition for Reorganization and to the appointment of a Trustee herein."

ORDER APPOINTING TRUSTEE

Paragraph 13 of the Order Appointing Trustee is the following:

"13. That said Trustee be, and hereby is, directed to give notice of the hearing fixed in Paragraph Number 10, at least Thirty (30) days prior to the 28th day of June, 1968, by mailing such notice to the creditors and stockholders of said Debtors, as the same may appear upon the Debtors' records, or as may be otherwise known to the Trustee, to the Secretary of the Treasury, Washington, D.C., and by mailing Two (2) copies of such notice to the Securities and Exchange Commission by registered mail, first class, postage prepaid, addressed to Washington, D.C., and to Chicago, Illinois, or to such other place as the Securities and Exchange Commission shall designate by written notice filed in this proceeding, and served upon the parties to this proceeding, such notice to be in the following form:

NOTICE OF HEARING UNDER SECTION 161

To all creditors and stockholders and Other Parties in Interest:

NOTICE IS HEREBY GIVEN that on the 13th day of February, 1968, and the 26th day of February, 1968, Petitions were filed herein against American National Trust and Republic National Trust, respectively, praying that proceedings be had under Chapter X of the Act of Congress relating to bankruptcy with respect to subject Debtors and that Orders were entered approving said Petitions and approving JOHN I. BRADSHAW, JR. Trustee of said Debtors.

NOTICE IS FURTHER GIVEN that June 28, 1968, at 9:30 o'clock a.m., Room 289 Federal Building, Indianapolis, Indiana, has been fixed as the time and place for the hearing of objections to the retention in office of JOHN I. BRADSHAW, JR. as Trustee upon the ground that he is not qualified or not disinterested as provided in Section 156 of said Act.

NOTICE IS FURTHER GIVEN that October 1, 1968, has been fixed as the time within which the

Trustee shall petition the Court for a time to prepare and file a plan of reorganization or a report of its reasons why a plan cannot be effected.

NOTICE IS FURTHER GIVEN that creditors and stockholders of said Debtors may submit to JOHN I. BRADSHAW, JR., said Trustee, at his office, Chamber of Commerce Building, Indianapolis, Indiana, on or before the 1st day of September, 1968, suggestions for the formulation of a plan for the reorganization of said Debtors, or proposals in the form of plans for the reorganization of said Debtors."

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 258

NEVA M. SHANKLIN, PETITIONER.

v.

AMERICAN NATIONAL TRUST AND REPUBLIC NATIONAL TRUST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION*

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–5) is reported at 420 F. 2d 1117. The district court rendered no opinion.

*The Securities and Exchange Commission is participating in the reorganization proceeding in the district court as a party pursuant to Section 208 of Chapter X of the Bankruptcy Act, 11 U.S.C. 608, and has taken positions in that court and in the court of appeals (Pet. App. A–3 to A–4) similar to the positions urged herein. As in *Protective Committee* v. *Anderson*, 390 U.S. 414, 420 n. 3, the Commission is "an unnamed respondent before this Court."

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1970. On April 3, 1970, Mr. Justice Marshall extended the time for the filing of the petition for a writ of certiorari to June 13, 1970, and the petition was filed on that date.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 11 U.S.C. 47(c).

QUESTION PRESENTED

Whether orders approving petitions for reorganization under Chapter X of the Bankruptcy Act of two common law real estate trusts, filed by certificate holders of the trusts, and thereafter consented to by the trusts, became final within the meaning of Section 149 of the Bankruptcy Act when the times to answer the petitions and to appeal from the orders had expired, thus precluding a subsequent vacation of the orders in the reorganization proceeding or through collateral attack in a state court.

STATUTE INVOLVED

The pertinent provisions of Chapter X of the Bankruptcy Act[1a], in addition to those printed in the petition, are as follows:

Section 149:

> An order, which has become final, approving a petition filed under this chapter shall be a

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[1] The record, however, was not filed until June 15, 1970, so there is a question as to the timeliness of the petition. Stern and Gressman, *Supreme Court Practice* (4th ed.) p. 265.

[1a] In Title 11 of the United States Code, the numbering of the sections of the Bankruptcy Act comprising Chapter X is higher by 400 than in the Act itself—*e.g.*, Section 149 of that Act is Section 549 under Title 11. All references to section numbers in the text are to sections of the Bankruptcy Act.

conclusive determination of the jurisdiction of the court.

Section 136:

> Within ten days after the service of the subpena and of a copy of the petition, or within such further time as the court may for cause shown allow, an answer controverting the facts alleged in the petition may be filed by the debtor.

Section 143:

> If the answer of a debtor shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied.

STATEMENT

Petitioner, a holder of certificates of beneficial interest in two common law real estate investment trusts formed under the laws of Indiana, challenges two orders of the United States District Court for the Southern District of Indiana entered in consolidated reorganization proceedings for those trusts under Chapter X of the Bankruptcy Act, 11 U.S.C. 501, *et seq.*

In February 1968, petitions for reorganization were filed against American National Trust and Republic National Trust, respectively, by three holders of cer-

tificates of beneficial interest in each of the trusts (R. 29, 38). The debtors filed answers opposing the petitions (R. 47, 55). Before any hearing thereon, petitioner filed a "Motion to Dismiss Petition and to Vacate and Set Aside Order Appointing Receiver and Order Adjudicating American National Trust and Republic National Trust Bankrupts." That motion urged, *inter alia*, that the certificate holders of the trusts were not creditors entitled to file an involuntary Chapter X petition (R. 59).

On April 26, 1968, the district court held a hearing on the petitions for reorganization and on petitioner's motion. At the hearing the debtors asked for and were granted leave to file amended answers, consenting to the petitions for reorganization (R. 61, 63). The three petitioning certificate holders then introduced evidence of representations, made at the time of sale of certificates of the trusts, that such certificates would be redeemed at face value by the trusts at any time (Tr. 18–19).[2] Upon inquiry by the district judge as to whether any persons present objected to the petitions for reorganization, petitioner (through her counsel) stated that she had no objection because, if the amendments to the answers filed by the trusts meant that they consented to the reorganization petitions (as counsel for the trusts thereupon stated), her position was "moot" (Tr. 37–38). At the close of the hearing, the court approved the petitions for reorganization, appointed trustees, and scheduled for June 28, 1968, a further hearing, pursuant to Section 161

[2] "Tr." refers to the transcript of the proceeding before the district court on April 26, 1968.

of the Act, to consider any objections to the trustees' continuation in office (R. 65, 75). No answer was filed thereafter pursuant to Section 137, which authorizes answers prior to the date set for a Section 161 hearing "by any creditor or indenture trustee or, if the debtor is not insolvent, by any stockholder of the debtor * * *"; and no appeal was taken from the order of April 26, 1968.

On October 22, 1968, petitioner filed suit in an Indiana state court against the trustees of the trusts seeking to set aside the debtors' consent to the approval of the reorganization petitions (R. 78). On November 6, 1968, the district court, pursuant to Section 116(4), stayed the state court suit (R. 83). Mrs. Shanklin then filed in the district court a petition to vacate and set aside the order approving the reorganization petitions, which questioned the status of the petitioning certificate holders as creditors of the debtor trusts and the good faith of the trusts in consenting to the petition (R. 86). The district court dismissed the petition to vacate (Pet. App. A-11), and the court of appeals affirmed that order and the earlier order staying the state court suit (Pet. App. A-1).

ARGUMENT

1. Section 149 of the Bankruptcy Act provides that an order approving a Chapter X petition which has

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Section 161 of the Act has no relevance to the issue here involved except that under Section 137 "the first date set for the hearing provided in Section 161" is the deadline for the filing of these answers.